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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER.

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Opinion Below.

The opinion of the Court of Appeals will be found at pages 9 to 12 of the Record. It is reported in 56 F. (2d) 300.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 25, 1932 (R. 12). The jurisdiction of this Court rests upon Section 240(*a*) of the Judicial Code,

as amended by the Act of February 13, 1925 (43 Stats. L. 936). The grounds upon which jurisdiction was invoked (Petition, pp. 3 and 4) are:

1. That the Court of Appeals has decided erroneously a question of general importance.

2. That said decision is in conflict with all decisions in other jurisdictions involving similar statutes, and therefore tends to unsettle the law.

3. That said decision, being the first rendered by any Federal Court, will establish an authoritative precedent which may greatly influence other courts in like cases.

4. That if said decision is permitted to stand it may deprive insurers of all defenses under all policies of life insurance, now outstanding or hereafter to be written in the District of Columbia, when there are no written applications therefor or when copies of such applications are not attached to the policies.

Question Presented.

Whether, under the statute quoted below, failure to deliver a copy of an application for life insurance with a policy which contains the entire contract and does not refer to any application, precludes the insurer from enforcing the condition of the policy itself that it may be declared void if the insured was not in sound health on the date of the policy.

Statute Involved.

The statute involved is Section 657 of the Code of Law of the District of Columbia (now Title 5, Sec.

183 of the Code of the District of Columbia, 1930 Ed.) which reads:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application.*" (Italics supplied.)

Statement of the Case.

Respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued by petitioner in December, 1927, to and upon the life of respondent's husband, in which policy respondent was named as beneficiary. The amount claimed was three hundred and seventy-one dollars and interest (R. 1). Insured died in May, 1929 (R. 5). The policy contained a provision (R. 4) that if insured was not "in sound health" at the date thereof the insurer might declare the policy void and that its liability in such event should be limited to the return of the premiums paid. It also contained the express statement that "this policy constitutes the entire agreement between the Company and the Insured and the holder and owner" thereof (R. 3). The insurer's defense was that the insured was not in sound health at the date of the policy (R. 6). At the trial, the Municipal Court rejected all evidence offered by petitioner, tending to

prove the defense stated, *upon the ground that copy of the application for the policy had not been attached to and delivered with it* (R. 6, 7). Judgment against petitioner was thereupon entered (R. 2).

On writ of error from the Court of Appeals, the ruling of the Municipal Court in excluding the offered evidence was assigned as error (R. 7). The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932 (R. 12).

The penalty prescribed by the statute for the failure to deliver a copy of the application with the policy is to deprive the insurer of any defense "on account of anything contained in, or omitted from, such application," but in this case no defense was made or attempted to be made "on account of anything contained in, or omitted from," an application (R. 6, 7). Not only was there no copy of an application delivered with the policy (R. 5), but the policy contained no reference to a written application, and there was no evidence at the trial that there had been a written application therefor (R. 6). Furthermore the policy contained the specific recital, above mentioned, that it constituted "the entire agreement between the Company and the Insured, and the holder and owner (t)hereof" (R. 3).

Specification of Error.

The Court of Appeals erred in holding that petitioner was not entitled to prove that insured was not in sound health when the policy was issued to him.

ARGUMENT.

The decision here sought to be reviewed precludes the insurer from interposing the defense to an action upon a life insurance policy that the *insured was not in sound health when the policy was issued.* The policy expressly provided that it might be declared void by the insurer if such were the fact and that the policy constituted "the entire agreement" (R. 3, 4). The policy was complete in itself and contained no reference whatever to an application. The appellate court sustained the ruling of the trial judge that the defense stated above was not available because no application was attached to the policy. This conclusion was reached through an erroneous interpretation of the statute heretofore quoted at page 3.

The insurer offered no defense whatever on account of anything contained in an application nor on account of anything omitted therefrom. In fact, there was no evidence at the trial that there had been any written application for the policy. All the insurer sought to prove was that the insured was not in sound health when the policy was issued (R. 7). This fact, if established, would have been a complete defense under the following terms of the policy itself:

> "*If,* (1) *the Insured* is not alive or *is not in sound health on the date hereof;* or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before

> said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * * then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company" (Italics supplied) (R. 5).

The offered evidence was rejected by the trial judge on the sole ground that the insurer could introduce no evidence whatever of the breach of the above terms of the policy because a copy of application had not been attached thereto (R. 7). This ruling, which the Court of Appeals sustained, manifestly is not justified by the *language* of the statute. That language would seem to be unambiguous and to be confined to the denial of defenses *based upon* "anything contained in, or omitted from," *the application.*

As recently as February 15, 1932, in *Bergholm* v. *Peoria Life Ins. Co.*, No. 297, October Term, 1931 (U. S. S. C. Ad. Op., p. 306), this Court said:

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense."

But if there be uncertainty as to the intention of Congress, arising out of the language of said Section, it is proper, if not necessary, to inquire as to the pur-

poses intended to be subserved by this legislation for such light as may thus be thrown upon the intention. These purposes have been referred to in a number of decisions involving similar statutes.

The Pennsylvania Act of May 11, 1881 (P. L. 20), in Sec. 1 provides:

> "All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The Supreme Court of Pennsylvania had this statute before it in the case of *Lenox* v. *Greenwich Insurance Co.*, 165 Pa. 575, 30 Atl. 940. With reference to the purpose of the Act, the Court said:

> "It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements

to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and, if it contained errors, have them rectified before it became too late."

The Iowa statute reads as follows:

"Sec. 1741. Copy of Application. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid; but, if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

In *Kirkpatrick* v. *London Guarantee & Accident Co.*, 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102, the Supreme Court of Iowa said, discussing the above

statute: "the purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached."

And in another case the same court discussing the same statute said:

> "One of the purposes of this statute, if not the sole purpose, is to cause all parts of the contract of insurance to appear in or upon the policy." *MacKinnon* v. *Mutual Fire Ins. Co.*, 89 Iowa 170, 56 N. W. 423.

The statute of Washington, Section 7075 Rem. Comp. Stat. provides:

> "Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract."

In dealing with this statute in *Washington Fire Relief Association* v. *Albro*, 130 Wash. 114, 226 Pac. 264, the Washington Court said:

> "The effect of this statute in cases where the application has not been delivered with the policy is not to make the policy void, but to prevent the insurance company from pleading or proving any such application, or using any such application in any way to affect the policy itself."

The present Section 657 was enacted in 1902 and is an amendment of an Act of 1901 (31 Stat., Chap. 854, Sec. 657, p. 1294), and the latter was a re-enactment of an Act passed in 1887 (24 Stats. 366, Chap. 46, Sec. 6). Neither the original Act nor the Act of 1901 imposed any penalty for failure to attach a copy of the application. The addition of a penalty was the principal change made by the amendment of 1902 and was expressed as follows: "*in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application.*" If the purposes of legislation upon this subject were as stated by the Iowa, Pennsylvania and Washington courts, *supra,* how can it be supposed that Congress by the language last above quoted intended to deprive the insured of the benefit of express terms contained in the policy itself? If such had been the intention, the qualifying words "*on account of anything contained in, or omitted from, such application,*" would have been omitted from the penalty, leaving it to read: "*in default of which no defense shall be allowed to such policy.*" It is worthy of notice that this matter was three times the subject of consideration and legislation by Congress, when enacting the original Act of 1887, the Act of 1901 and the amended Act of 1902.

Of the intention of Congress the Court of Appeals itself, in an earlier case (1918), referring to section 657, said:

> "The manifest purpose of Congress in adopting it was to compel insurance companies, whether old line or fraternal, to state the entire contract *either in the policy* or the policy and application, so that the insured would be able to find the terms defining his obligations and rights as a policyholder in not more than two papers." *Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C. 151, 154. (Italics supplied.)

All of the cases, under statutes similar to section 657, agree that, where the insurer fails to deliver a copy of the application with the policy, the application is no part of the contract, and consequently the insurer may not defend upon any statement in or omission from the application, and may not offer the application in evidence for any purpose. In the present case, the insurer sought to do neither. All courts in which the point has arisen (except the Court of Appeals in the present case) hold that, unless the copy be attached, the application forms no part of the contract and the rights of the parties are to be determined by the terms of the policy alone. This is particularly emphasized when, as in the present case, the policy contains no reference to an application. But no other court (than the Court of Appeals) has held that the insurer who fails to attach a copy of a written application to the policy, is intended by these statutes to be penalized to the extent of denying it

the right to show a breach of an express condition *of the policy* such as petitioner here relied upon. Petitioner was prevented by the ruling complained of from proving that the insured, who died within eighteen months, was not in sound health when the policy was issued.

The Court of Appeals referred to none of the decisions which have dealt with the question, nor to the text-writers upon the subject. Its opinion cites two cases only—both decided by that Court—and in neither was the present question considered or even touched upon. One of these is *Metropolitan Life Ins. Co.* v. *Burch*, 39 App. D. C. 397, in which it was held that the requirement of section 657, that a copy of the application be attached to the policy, applied to the renewal of a lapsed policy; the other, *Metropolitan Life Ins. Co.* v. *Hawkins*, 31 App. D. C. 493, in which it was decided that the insurer may not defend upon a warranty contained in the application, when a part only of the application was attached to the policy.

Statutes of the general nature of Section 657 are in force in approximately twenty states (1 Joyce on Insurance, 2d Ed., Sec. 190), and have been the subject of frequent interpretation by the State courts. Careful research has failed to disclose a single decision in harmony with the conclusion of the Court of Appeals, or the views of any text-writer which would support that conclusion. Some of the state cases will now be adverted to.

In *Rauen* v. *Prudential Ins. Co. of Am.*, 129 Iowa 725, 106 N. W. 198, the policy, issued in Minnesota, contained no copy of the application. The Minnesota

statute required attachment, but prescribed no penalty for failure. The Iowa court interpreting the statute said:

> "The statute of Minnesota pleaded and relied upon by the appellant, and above quoted requires that each policy of insurance which contains a reference to the application of the insured, 'whether as a part of the policy or as having any bearing thereon,' must have attached thereto a correct copy of the application. In our judgment the effect of this provision is to exclude or eliminate from the contract all reference to an application a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. To hold otherwise is to rob the statute of all effective force and make its enactment meaningless. We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and enforced as if no written application had been made. * * * The statute is clearly intended to protect the policyholder by requiring the company to place in his hands written evidence of the entire contract between them, and a company issuing a policy to which no copy of application is attached must be held to have thereby expressed its purpose to waive or relinquish its right to have said application considered as any part of the contract."

In *Panopoulos, Extr.* v. *Metropolitan Life Ins. Co.*, 96 Pa. Sup. Ct. 325, Helen Panopoulos, a married woman, in 1926 insured her life with defendant company in favor of her estate, the policy being an indus-

trial, or weekly payment one. She died on March 18, 1926. In an action by her executor on the policy the defendant set up as a defense a serious operation performed on the insured and not indorsed on the policy as required by terms thereof. The policy stated it was issued "subject to the conditions below and on page two hereof, each of which is hereby made a part of this contract, and contracted by the insured and every person entitled to claim thereunder, to be a part hereof." Among the conditions was the following:

> "This policy contains the entire agreement between the company and the insured and the holder and owner hereof"; and:
>
> "If, (2)—the insured—has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or before said date has had any pulmonary disease or chronic bronchitis or cancer or disease of the heart, liver or kidneys, unless such—medical attention or previous disease is specifically recited in the 'space for endorsements' on page four in a waiver signed by the secretary—then in any such case the company may declare this policy void * * *"

There was a directed verdict for defendant below, and in affirming the judgment the Court said:

> "This case does not involve the question of the truth or falsity of a warranty as to some matter material to the risk made in the policy. Under this policy the application, if one there was, is not made part of the contract, but the company protected itself by the provision that the policy constitutes the entire agreement be-

tween it and the insured and the holder and owner thereof. It must be held to have meant what it said. This Court said in *Connell* v. *Life Ins. Co.*, 16 Pa. Sup. Ct. 520, 529, speaking by the present President Judge, 'there is a difference between obtaining a contract through a misrepresentation as to a fact, and making the existence of that fact a condition upon which the contract, by its written terms, is dependent.' In that case the policy provided: 'This policy is void if the insured, before its date, has been rejected for insurance by themselves or any other company, or has been attended by a physician for any serious disease or complaint.' Referring to this language, Judge Porter said: 'These were unequivocal, absolute covenants. Whether the policy was void was dependent upon actual conditions, past or present, and not upon the knowledge of those conditions possessed by the parties. The Act of June 23, 1885, relates "to warranties in the application for life insurance policies," and has no application to the express covenants of the policy itself, not directly dependent upon such warranties. The defense in this action was that the assured, prior to and at the time of the issuance of the policy, had Bright's Disease of the kidneys and that she continued to suffer from and died of that disease. If this was true the express covenant of the parties hereinbefore recited cannot be disregarded, and the policy was void.' The principle announced in the Connell case is controlling here. The fact that the insured had not, within two years before the date of the policy, been attended by a physician for any serious disease or complaint was made by the policy a condition precedent to defendant's

> liability for any more than the return of premiums paid on it. There can be no doubt that the fact that the insured was attended by a physician within two years for the disease or complaint which resulted in her operation was palpably and manifestly material to the risk, and that uncontradicted proof of a false warranty in respect to it in an application for insurance would have required binding instructions in defendant's favor in a case involving false warranties in the application * * *. The same result must follow when, as here, there is uncontradicted proof that a condition, past or present, materially affecting the risk, upon which the parties have covenanted that the validity of the policy shall depend, never existed."

The same Court in the case of *Hood* v. *Prudential Insurance Co.*, 22 Pa. Sup. Ct. Rep. 244, held:

> "The object of the Act of May 11, 1881, P. L. 20, was to relieve policy holders from warranties contained in their application, unless said application was attached to the policy, but it has not been held, so far as we know, that the fact of whether the insured was in sound health or not, could not be proved outside the application. It probably would not be proper to show the contents of the paper. Certainly not, if the insured or his representatives were to be bound by anything contained in the paper from the effects of which he is relieved by the act of assembly, but substantive facts not connected with the representations contained in the application may undoubtedly be proved by competent testimony outside the application."

And practically the same rule was laid down by that Court in *Moore* v. *Bestline*, 23 Pa. Sup. Ct. Rep. 6.

The Supreme Court of Pennsylvania, considering this question in *Imperial Fire Ins. Co.* v. *Dunham*, 117 Pa. 460, 12 Atl. 668, 673, said:

> "The application was rightly excluded from the testimony. The provisions of the Act of 11th of May, 1881 (P. L. 20), are conclusive on this point. No copy of the application or of the by-laws of the company was attached to the policy as that Act requires. It constituted, therefore, no part of the policy, or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed."

To the same effect are: *Norristown Title, etc., Co.* v. *John Hancock Mutual Life Ins. Co.*, 132 Pa. 385, 19 Atl. 270, and *Hebb* v. *Kittanning Ins. Co.*, 138 Pa. 174, 20 Atl. 837.

Wilcox v. *Continental Ins. Co. of New York*, 85 Wis. 193, 55 N. W. 188, was a case in which plaintiff applied to defendant for insurance on a stallion and a policy was issued which provided:

> "This entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

There was both a chattel mortgage and insurance on the stallion at the issuance of the policy sued on, but no questions were asked by the insurance agent about this. Defendant set up the above condition of the policy. Section 1945*a*, Wisconsin Statutes, required insurance companies to "attach to such policy, or endorse thereon, a true copy of any application or representations of the assured, which by the terms of such policy are made a part thereof, * * * or referred to therein" or be precluded from disproving the statements so made in such application upon the trial. Discussing plaintiff's objection to this defense, the Court said:

> "The argument here is to the effect that the defense is based wholly upon a supposed 'implied false representation' made by the plaintiff as to the nonexistence of such prior insurance and mortgage; and hence, in analogy to the rule under the statute, the defendant should be precluded from proving the same. But we do not understand such to be the defense. On the contrary, we understand the defense to be based upon the strict terms of the contract, which, as already indicated, is to the effect that the policy should not be operative at all in case of such prior insurance or mortgage, unless by agreement in writing attached to or indorsed upon the policy, as mentioned."

The judgment below for the defendant was affirmed.

In *MacKinnon* v. *Mutual Fire Ins. Co.*, 89 Iowa 170, 56 N. W. 423, the policy sued on provided:

> "If the building stands on leased ground or if the title be less than fee simple in the insured,

> it must be so represented to said company, and so expressed in the written portion of the policy; otherwise, said policy shall be void" and "if said insured shall conceal any fact material to the risk, said policy shall become void."

The defendant offered evidence to show violation of both of the above terms of the policy, but the evidence was excluded for failure to attach to the policy a copy of the application as required by the Iowa statute set out on page 8, *supra*. Discussing this phase of the case the Court said:

> "We have seen that this policy expressly provides that if the buildings stand on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in this policy; otherwise, the policy will be void.
>
> It is not expressed in the policy that the buildings stood on leased ground, nor that the title in the insured was less than fee simple, and the inference must be that it was not so represented to the company. The policy also provides that, if the insured concealed any fact material to the risk, the policy shall be void. It was material to the risk whether the buildings stood upon leased ground, and whether the title of the insured was less than fee simple. The evidence excluded tends to show that the buildings were on leased ground, that the title of the insured was less than fee simple, and that the insured concealed those facts. It did not tend to prove an application or representation not appearing in or upon the policy, but rather the breach of conditions expressed in the policy. If it may be

> said that a failure to disclose the true state of their title was a representation on the part of the insured, then it is a representation appearing in the policy, and not within the restrictions of the statute."

Washington Fire Relief Ass'n v. *Albro* (Wash.), 226 Pac. 264, was a suit to recover back, on ground of fraud, money paid defendant under a fire insurance policy after a loss had occurred. In a written application insured had stated that he had had no other insurance. He had made the same statement orally prior to issuance of the policy and again during the negotiations for settlement. Plaintiff Company wished to prove these statements by defendant but they were excluded on the ground that insured had not been given a copy of the application with the policy as required by Section 7075 Rem. Comp. Stat. which appears at page 9, *supra*. The Court said:

> "Under this section, the insurance company is not compelled to deliver a copy of the application for insurance with the policy, but, if it fail to make such delivery, the application then does not become a part of the insurance contract, but the insurance contract shall then be construed according to its terms and conditions upon its face, without reference to what may have been contained in the application.
>
> "The effect of the statute in cases where the application has not been delivered with the policy is not to make the policy void, but to prevent the insurance company from pleading or proving any such application, or using any such application in any way to affect the policy it-

> self. If there were no provisions in the policy itself relating to other insurance, then, in this case, the insurance company would be prevented from in any way raising that question. But the policy itself does make provision in regard to other insurance, and under Section 7075, *supra,* which provides that it shall be construed according to its terms and conditions, it was open to the appellant to prove that representations had been made in regard to other insurance, which, if false and fraudulent and operative to induce the entering into the contract of insurance, could be proven by any means other than the introduction of the application itself. The Court, therefore, was in error in excluding the testimony offered to show representations and statements, other than those contained in the application, made by the respondents at the time they secured the policy, or when they were attempting to enforce payment thereunder."

The Supreme Court of Iowa considered this question in *Kirkpatrick* v. *London Guarantee & Accident Co., supra,* 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102. The statute involved is set out above at page 8. The following apt quotations are taken from the opinion in that case:

> "The contention for appellee" (the insured) "in the lower court and on this appeal is that, if representations or warranties were made in the application, a copy of which was not incorporated into or attached to the policy as required by statute, then no issue can be raised by the company as to representations or warranties found in the policy, although the policy makes no reference to such application; in other

words, that, although there are statements and warranties in the policy which, without reference to the application, are material to the contract, the defendant cannot raise any issue under such statements and warranties relating to the same subject matter, a copy of which was not incorporated into or attached to such policy. The appellant, on the other hand, insists that the existence of an application, not incorporated into or attached to the policy by reference does not preclude it from relying by way of defense on falsity of statements or breaches of warranty available to it under the policy as delivered, without reference to any application which may have been made, but which was not thus incorporated or attached. Appellant did not, as the question was finally presented in the lower court, plead or attempt to rely upon the falsity of any statements or the breach of any warranty found in the application itself, but relied exclusively upon the terms of the policy as furnishing the basis for the defenses which it interposed in this respect. The section of the code which we are now asked to interpret has frequently been considered by this Court, and has been liberally applied in excluding an insurance company from relying in any way upon representations or warranties contained in an application, a copy of which has not been incorporated into or attached to the policy; and the purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached" (Citations). "An evident purpose of

this statute is that, when the application is made a part of the contract, * * * a true copy must be attached to the policy, so that the writings composing the contract may all appear together, and that the insured may be in possession of the evidence of what his contract is. *Johnson* v. *Des Moines L. Ins. Co.*, 105 Iowa 273, 75 N. W. 101."

"Nothing said in any of our cases gives confidence to the thought, however, that a failure to incorporate or attach a true copy of the application in or to the policy should preclude the company from relying on any defense available to it under the terms of the policy as to which no reference to an application not incorporated or attached by copy is necessary. There is no language in this policy indicating a purpose or attempt on the part of the company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain all the terms and stipulations of the contract of insurance. If the company sees fit to ignore the statements and warranties of the application, and to issue a policy which purports to contain in plain terms all the stipulations and conditions of the contract, and such a policy is accepted by the assured as constituting the contract, we see no reason for holding that the company has, by omitting to incorporate or attach a copy of an application, debarred itself from insisting upon the policy as written as constituting the complete and conclusive contract between the parties. The assured has no cause to complain if the company fails to give any consideration to his representations and warranties in the application."

In *Western & Southern L. Ins. Co.* v. *Weber,* decided in 1919 by the Court of Appeals of Kentucky, 209 S. W. 716, 183 Ky. 32, the Insurance Company had issued a policy of insurance upon the life of one John L. Weber, agreeing to pay Petie, wife of Weber, $200 upon certain conditions. Petie had made a written application for the policy in which she had given Weber's age as forty-nine, when in fact it was fifty-six. The company alleged that relying upon the statement that insured was only forty-nine no physical examination was made of him as would have been done had his true age been given, and that such examination if made, would have developed the fact that insured was insane at the time of the application. The policy contained no reference to the application as forming any part of the contract between the parties and neither the application nor any copy thereof was attached to the policy.

Sec. 679 Kentucky Statutes provides:

> "All policies or certificates hereafter issued to persons within the Commonwealth of Kentucky by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the by-laws, or the rules of the corporation, either as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, shall have such application, by-laws and rules, or the parts thereof relied upon as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, attached to the policy or certificate, or printed on

> the face or reverse side thereof, and unless either so attached and accompanying the policy, or printed on the face or reverse side thereof, shall not be received as evidence in any action for the recovery of benefits provided by the policy or certificate, and shall not be considered a part of the policy, or of the contract between the parties."

The case came before the court on demurrer to defendant's plea that insured had mental disease when the policy was issued. The lower court sustained the demurrer. The appellate court reversed the judgment and decided that since the policy made no reference to the application, the section of the statutes did not apply, and the opinion then continued as follows:

> "For an additional reason it was error to sustain the demurrer to the third paragraph of the answer. As a defense it relied upon matters appearing both in the application and the policy, the latter containing this condition: 'And shall be void (the policy) if the insured * * * has had before said date (of the policy) any * * * disease of the brain.' Even if the statute which we have considered had been applicable to the facts of this case, a violation of it would not have prevented this defense, since it is one, as we have seen, based upon a condition contained *in the policy* for 'the failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense that it may have under the express terms of the policy without reference to the application.'" Citing 14 R. C. L. 886.

In 1931 this same question came before the Supreme Court of Mississippi in the case of *Metropolitan Life Ins. Co.* v. *Scott*, 160 Miss. 537, 134 So. 159. Sec. 5174 Mississippi Code of 1930, reads:

> "All life insurance companies doing business in the state of Mississippi shall deliver to the insured with the policy, certificate or contract of insurance in any form a copy of the insured's application, and in default thereof said life insurance company shall not be permitted in any court of this state to deny that any of the statements in said application are true."

The facts of that case are practically identical with those of the case at bar except that in the former there *was evidence of a written application* having been made. It was an appeal from a judgment for plaintiff in a suit on the insurance policy. The policy provided:

> "If (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or any other company, * * * then, in any such case, the Company may declare this Policy void" * * *

Defendant pleaded the above conditions of the policy and that deceased was not in sound health at time policy issued. Plaintiff contended that defendant could not rely on this because it had required a written application showing insured was in sound health and had not attached a copy of the application to the policy. The Court, however, said:

"The appellant by its pleadings did not rely upon the falsity of any statements or the breach of any warranty found in the application itself, but relied exclusively upon the terms of the policy as the basis of the defenses interposed, and it contends that the existence of an application not incorporated into or attached to the policy by reference, and not delivered to the insured with the policy, does not preclude it from relying on breaches of conditions or warranties contained in the policy itself.

"One evident purpose of the statute requiring the delivery to the insured of a copy of the application is to exclude or eliminate from the contract an application, a copy of which is not delivered to the insured with the policy, and to render ineffective any defenses or attempted defenses based upon anything contained in such application, but it does not follow that a failure to incorporate in or attach to the policy a copy of the application will preclude the company from relying on any defenses available to it under the terms of the policy. In the policy here involved there is no language or provision indicating a purpose or attempt on the part of the appellant company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain in plain language all the terms, conditions, and stipulations of the contract, and we do not think the company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to the same subject matter. When the company chose to ignore the statements and representations ap-

> pearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defenses it might have under the terms of the policy, without reference to such application."

The conclusions of the text-writers from their consideration of the decided cases upon this subject are uniform, and indicate no doubts as to the proper interpretation of such statutes in this regard. Referring to the penalties which an insurer must suffer, if it omits to attach a copy of the application to the policy, the text-writer on the subject of "Insurance," in 14 R. C. L. at p. 886, concludes:

> "Failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense it may have under the express terms of the policy without reference to the application."

And Joyce in Vol. 1 of his work on Insurance, 2d Ed. Sec. 190*q*, says:

> "The omission to endorse or attach a copy of the application does not, however, invalidate the policy, but only goes to the pleading and proof of the representations."

And further on in the same section he says:

> "And where there is no defense whatever to the application and no reliance thereon or assertion of rights thereunder by the insurer, it is

not precluded from defenses based only upon the policy itself."

In 2 Cooley's Briefs on Insurance, 2d Ed., p. 1091, *et seq.*, many cases upon this subject are quoted and, while the author points out the penalties for the failure to attach the application to the policy which are imposed by the statutes, as interpreted by the cases cited, it is nowhere suggested that the insurer is to be penalized to the extent of depriving it of the right of defending for breaches of conditions clearly set forth in the policy itself.

Conclusion.

It is respectfully submitted that the Court of Appeals erred in holding that petitioner could offer no evidence in support of its defense under a specific term of the policy, and that its judgment should therefore be reversed.

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